

#### **401 KAR 5:070. Provisions of the KPDES permit.**

RELATES TO: KRS 224.01-010, 224.01-070, 224.01-400, 224.70-100, 224.70-120, 224.99-010, 40 C.F.R. sec. 403, 33 U.S.C. 1251 et seq.

STATUTORY AUTHORITY: KRS 224.10-100, 224.16-050, 224.70-110, 40 C.F.R. sec. 403, 33 U.S.C. 1251 et seq., 1342

NECESSITY, FUNCTION, AND CONFORMITY: KRS 224.16-050(1) provides that the Environmental and Public Protection Cabinet may issue federal permits pursuant to 33 USC Section 1342(b) of the Federal Water Pollution Control Act, 33 USC Section 1251 et seq. subject to the conditions imposed in 33 USC Sections 1342(b) and (d). KRS 224.16-050(1) requires that any exemptions granted in the issuance of NPDES permits shall be pursuant to 33 USC Sections 1311, 1312, and 1326(a). Further, KRS 224.16-050(4) requires that the cabinet shall not impose under any permit issued pursuant to this section any effluent limitation, monitoring requirement or other condition which is more stringent than the effluent limitation, monitoring requirement or other condition which would have been applicable under the federal regulation if the permit were issued by the federal government. This administrative regulation contains the basis for provisions, terms, and effect of a KPDES permit, including permit duration, schedule of compliance, and basis for permit modification or revocation and reissuance.

Section 1. Duration of Permits. (1) KPDES permits shall be effective for a fixed term not to exceed five (5) years. Except as provided in [401 KAR 5:060](#), Section 1(5)(c), the term of a permit shall not be extended by modification beyond this maximum duration. The cabinet may issue a permit for a duration that is less than the full five (5) year term.

(2) A permit may be issued for the full term if the permit includes effluent limitations and a compliance schedule to meet the requirements of [401 KAR 5:080](#), Section 1(2) whether or not applicable federal effluent limitations guidelines have been promulgated or approved.

Section 2. Schedules of Compliance. (1) The permit may, if appropriate, specify a schedule of compliance leading to compliance with KRS Chapter 224 and administrative regulations promulgated pursuant thereto.

(a) Time for compliance. Any schedules of compliance under this section shall require compliance as soon as possible. In addition, schedules of compliance shall require compliance not later than the applicable deadline specified in [401 KAR 5:080](#).

(b) The first KPDES permit issued to a new source or a new discharger shall contain a schedule of compliance only if necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised after commencement of construction but less than three (3) years before commencement of the relevant discharge. For recommencing dischargers, a schedule of compliance shall be available only if necessary to allow a reasonable opportunity to attain compliance with requirements issued or revised less than three (3) years before recommencement of discharge.

(c) Interim dates. Except as provided in subsection (2)(a)2 of this section, if a permit establishes a schedule of compliance which exceeds one (1) year from the date of permit issuance, the schedule shall set forth interim requirements and the dates for their achievement.

1. The time between interim dates shall not exceed one (1) year.

2. If the time necessary for completion of any interim requirement, such as the construction of a control facility, is more than one (1) year and is not readily divisible into stages for completion, the permit shall specify interim dates for the submission of reports of progress toward completion of the interim requirements and indicate a projected completion date.

(d) Reporting. The permit shall be written to require that no later than fourteen (14) days following each interim date and the final date of compliance, the permittee shall notify the cabinet

in writing of its compliance or noncompliance with the interim or final requirements, or submit progress reports.

(2) Alternative schedules of compliance. A KPDES permit applicant or permittee may cease conducting regulated activities, by termination of direct discharge for KPDES sources, rather than continue to operate and meet permit requirements as follows:

(a) If the permittee decides to cease conducting regulated activities at a given time within the term of a permit which has already been issued:

1. The permit may be modified to contain a new or additional schedule leading to timely cessation of activities; or

2. The permittee shall cease conducting permitted activities before noncompliance with any interim or final compliance schedule requirement already specified in the permit.

(b) If the decision to cease conducting regulated activities is made before issuance of a permit whose term will include the termination date, the permit shall contain a schedule leading to termination which shall ensure timely compliance no later than the statutory deadline.

(c) If the permittee is undecided whether to cease conducting regulated activities, the cabinet shall issue or modify a permit to contain two (2) schedules as follows:

1. Both schedules shall contain an identical interim deadline requiring a final decision on whether to cease conducting regulated activities no later than a date which ensures sufficient time to comply with applicable requirements in a timely manner if the decision is to continue conducting regulated activities;

2. One (1) schedule shall lead to timely compliance no later than the deadline contained in [401 KAR 5:080](#);

3. The second schedule shall lead to cessation of regulated activities by a date which shall ensure timely compliance no later than the deadline specified in [401 KAR 5:080](#); and

4. Each permit containing two (2) schedules shall include a requirement that after the permittee has made a final decision under subparagraph 1 of this paragraph it shall follow the schedule leading to compliance if the decision is to continue conducting regulated activities, and follow the schedule leading to termination if the decision is to cease conducting regulated activities.

(d) The applicant's or permittee's decision to cease conducting regulated activities shall be evidenced by a firm public commitment satisfactory to the cabinet, such as a resolution of the board of directors of a corporation.

Section 3. Requirements for Recording and Reporting of Monitoring Results. All permits shall specify:

(1) Requirements concerning the proper use, maintenance, and installation, if appropriate, of monitoring equipment or methods, including biological monitoring methods if appropriate;

(2) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, if appropriate, continuous monitoring; and

(3) Applicable reporting requirements based upon the impact of the regulated activity and as specified in [401 KAR 5:065](#), Sections 1 and 2. Reporting shall not be less frequent than specified in Section 2 of this administrative regulation.

Section 4. Effect of a Permit. (1) Except for any toxic effluent standards and prohibitions included in [401 KAR 5:065](#), Section 1(1)(b), compliance with a KPDES permit during its term shall constitute compliance, for purposes of enforcement, with the KPDES program. A permit may be modified, revoked and reissued, or revoked during its term for cause as set forth in Sections 6 and 7 of this administrative regulation.

(2) The issuance of a permit shall not convey any property rights of any sort, or any exclusive privilege.

(3) The issuance of a permit shall not authorize any injury to persons or property or invasion of other private rights, or any infringement of state or local law or administrative regulations.

Section 5. Transfer of Permits. (1) Transfers by modification. Except as provided in subsection (2) of this section, a permit may be transferred by the permittee to a new owner or operator only if the permit has been modified or revoked and reissued, under Section 6 of this administrative regulation, or if a minor modification has been made to identify the new permittee and incorporate other requirements as may be necessary under the KPDES administrative regulations.

(2) Automatic transfers. As an alternative to transfers under subsection (1) of this section, any KPDES permit may be automatically transferred to a new permittee if:

(a) The current permittee notifies the cabinet at least thirty (30) days in advance of the proposed transfer date in paragraph (b) of this subsection;

(b) The notice includes a written agreement between the existing and new permittees containing a specific date for transfer of permit responsibility, coverage, and liability between them; and

(c) The cabinet does not notify the existing permittee and the proposed new permittee of an intent to modify or revoke and reissue the permit. A modification under this paragraph may also be a minor modification under Section 6(3) of this administrative regulation. If this notice is not received, the transfer shall be effective on the date specified in the agreement mentioned in paragraph (b) of this subsection.

Section 6. Modification or Revocation and Reissuance of Permit. If the cabinet receives any information, the cabinet may determine whether or not one (1) or more of the causes, listed in subsections (1) and (2) of this section for modification or revocation and reissuance or both, exist. If cause exists, the cabinet may modify or revoke and reissue the permit accordingly, and may request an updated application if necessary. If a permit is modified, only the conditions subject to modification shall be reopened. If a permit is revoked and reissued, the entire permit shall be reopened and subject to revision and the permit shall be reissued for a new term. If cause does not exist under this section, the cabinet shall not modify or revoke and reissue the permit. If a permit modification satisfies the criteria in subsection (3) of this section for "minor modifications" the permit may be modified without a draft permit or public review. Otherwise, a draft permit shall be prepared and other procedures in [401 KAR 5:075](#) shall be followed.

(1) Causes for modification. The following shall be causes for modification but not revocation and reissuance of permits unless the permittee agrees to revocation and reissuance as well as modification of a permit.

(a) Alterations. If there are material and substantial alterations or additions made to the permitted facility or activity which occurred after permit issuance, the alterations may justify the application of permit conditions that are different or absent in the existing permit.

(b) Information. If the cabinet has received information, cause may exist for modification. KPDES permits may be modified during their terms for this cause only if the information was not available at the time of permit issuance, except for revised administrative regulations, guidance, or test methods which would have justified application of different conditions at the time of permit issuance. In addition, the applicant shall show that the information would have justified the application of different permit conditions at the time of issuance. For KPDES general permits this cause shall include any information indicating that cumulative effects on the environment are unacceptable.

(c) New administrative regulations. If the standards or administrative regulations on which the permit was based have been changed by promulgation of amended standards or administrative regulations or by judicial decision after the permit was issued, then cause may exist for modification. The permit shall be modified only as follows:

1. For promulgation of amended standards or administrative regulations, if:

a. The permit condition requested to be modified was based on a promulgated effluent limitation guideline, EPA approved or promulgated water quality standards of [401 KAR 5:031](#), or the secondary treatment administrative regulations of [401 KAR 5:045](#);

b. EPA has revised, withdrawn, or modified that portion of the federal regulation or effluent limitation guideline or has approved a cabinet action with regard to a water quality standard on which the permit condition was based; and

c. A permittee requests modification in accordance with [401 KAR 5:075](#), Section 2, within ninety (90) days after the amendment, revision, or withdrawal is promulgated.

2. For judicial decisions, a court of competent jurisdiction has remanded and stayed EPA promulgated effluent limitation guidelines, if the remand and stay concern that portion of the guidelines on which the permit condition was based and a request is filed by the permittee in accordance with [401 KAR 5:075](#), Section 2, within ninety (90) days of judicial remand.

(d) Compliance schedules. A permit may be modified if the cabinet determines good cause exists for modification of a compliance schedule, based on an act of God, strike, flood, materials shortage, or other events over which the permittee has little or no control and for which there is no reasonably available remedy. A KPDES compliance schedule shall not be modified to extend beyond an applicable statutory deadline in [401 KAR 5:080](#).

(e) For a small municipal separate storm sewer system (MS4), to include an effluent limitation requiring implementation of minimum control measures as specified in [401 KAR 5:060](#), Section 12(9)(b), if:

1. The permit does not include these measures based upon the determination that another entity was responsible for implementation of the requirements; and

2. The other entity fails to implement measures that satisfy the requirements.

(f) In addition the cabinet may modify a permit:

1. If the permittee has filed a request for any variance under [401 KAR 5:055](#), Section 7, or [401 KAR 5:080](#), Section 3, and the cabinet processes the request under the applicable provisions.

2. If required to incorporate applicable toxic effluent standard or prohibition under [401 KAR 5:065](#), Section 2(2).

3. If required by the "reopener" conditions in a permit, which are established in the permit under [401 KAR 5:065](#), Section 2(3), for toxic effluent limitations, or [401 KAR 5:065](#), Section 2 (40 CFR Section 403.10(e), pretreatment program).

4. Upon request of a permittee who qualifies for a change in effluent limitations based on pollutants in intake water under [401 KAR 5:065](#), Section 3(7).

5. If a discharger is no longer eligible for net limitations, as provided in [401 KAR 5:065](#), Section 3(7).

6. As necessary under EPA effluent limitations guidelines concerning compliance schedule for development of a pretreatment program.

7. If the level of discharge of any pollutant which is not limited in the permit exceeds the level which can be achieved by the technology-based treatment requirements appropriate to the permittee under [401 KAR 5:080](#), Section 1(2)(c).

8. If the permittee begins or expects to begin to use or manufacture as an intermediate or final product or by-product any toxic pollutant which was not reported in the permit application under [401 KAR 5:060](#), Section 2.

9. To establish a "notification level" as provided in [401 KAR 5:065](#), Section 2(6).

10. To modify a schedule of compliance to reflect the time lost during the construction of an innovative or alternative facility, for a POTW which has received a grant under CWA Section 202(a)(3), 33 USC Section 1282(a)(3) for 100 percent of the cost to modify or replace facilities constructed with a grant for innovative or alternative wastewater technology under CWA Section 202(a)(2), 33 USC Section 1282(a)(2). Without exception, the compliance schedule shall not be modified to extend beyond an applicable statutory deadline for compliance indicated in [401 KAR 5:080](#).

11. Upon failure of the cabinet to notify an affected state whose waters may be affected by a discharge from Kentucky.

12. If the permit becomes final and effective on or after August 19, 1981, if the permittee shows a good cause for the modification, to conform to changes respecting the following administrative regulation: [401 KAR 5:065](#), Section 1(3) and (4).

13. To correct technical mistakes, such as errors in calculation, or mistaken interpretations of law made in determining permit conditions.

14. If the discharger has installed the treatment technology considered by the cabinet in setting effluent limitations imposed under [401 KAR 5:080](#), Section 1 and CWA Section 402(a)(1), [33 USC Section 1342\(a\)\(1\)](#) and has properly operated and maintained the facilities but nevertheless has been unable to achieve those effluent limitations. If this occurs, the limitations in the modified permit may reflect the level of pollutant control actually achieved (but shall not be less stringent than required by a subsequently promulgated effluent limitations guideline).

15. If the permit becomes final and effective on or after March 9, 1982, and the permittee applies for the modification no later than January 24, 1985, if the permittee shows good cause in its request and that it qualifies for the modification, to conform to changes respecting the following administrative regulations: [401 KAR 5:055](#), Section 6(2) and [401 KAR 5:065](#), Section 3(2) and (3).

(2) Causes for modification or revocation and reissuance. The following shall be causes to modify or, alternatively revoke and reissue a permit:

(a) Cause exists for revocation under Section 7 of this administrative regulation and the cabinet determines that modification or revocation and reissuance is appropriate.

(b) The cabinet has received notification of a proposed transfer of the permit. A permit also may be modified to reflect a transfer after the effective date of an automatic transfer but shall not be revoked and reissued after the effective date of the transfer except upon the request of the new permittee.

(3) Minor modifications of permits. Upon the consent of the permittee, the cabinet shall modify a permit to make the corrections or allowances for changes in the permitted activity listed in this section, without following the procedures of [401 KAR 5:075](#). Any permit modification not processed as a minor modification under this section shall be made for cause and with a [401 KAR 5:075](#) draft permit and public notice as required under this section. Minor modifications shall only:

(a) Correct typographical errors;

(b) Require more frequent monitoring or reporting by the permittee;

(c) Change an interim compliance date in a schedule of compliance, if the new date is not more than 120 days after the date specified in the existing permit and does not interfere with attainment of the final compliance date requirements;

(d) Allow for a change in ownership or operational control of a facility if the cabinet determines that no other change in the permit is necessary, if a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the cabinet;

(e) Change the construction schedule for a discharger which is a new source;

(f) Delete a point source outfall if the discharge from that outfall is terminated and does not result in discharge of pollutants from other outfalls except in accordance with permit limits; or

(g) Incorporate conditions of a POTW pretreatment program that has been approved in accordance with the procedures in [401 KAR 5:057](#) or a modification thereto that has been approved in accordance with the procedures in [401 KAR 5:057](#) as enforceable conditions of the POTW's permits.

Section 7. Revocation of Permit. (1) The following shall be causes for revoking a permit during its term, or for denying a renewal application:

(a) Noncompliance by the permittee with any condition of the permit;

(b) The permittee's failure in the application or during the permit issuance process to disclose fully all relevant facts, or the permittee's misrepresentation of any relevant fact at any time; or

(c) A determination that the permitted activity endangers human health or the environment and can only be regulated to acceptable levels by permit modification or revocation.

(2) KPDES permits may be modified or revoked if there is a change in any condition that requires either a temporary or a permanent reduction or elimination of any discharge controlled by the permit for example, plant closure or termination of discharge by connection to a POTW.

(3) The cabinet shall follow the applicable procedures in [401 KAR 5:075](#) in revoking any KPDES permit under this section, except that if the entire discharge is permanently terminated by elimination of the flow or by connection to a POTW, but not by land application or disposal into a well, the cabinet may revoke the permit by notice to the permittee. Revocation by notice shall be effective thirty (30) days after notice is sent, unless the permittee objects within that time. If the permittee objects during that period, the cabinet shall follow [401 KAR 5:075](#), Section 2, revocation procedures. Expedited permit revocation procedures shall not be available to permittees that are subject to pending enforcement actions including citizen suits brought under KRS Chapter 224 and the Clean Water Act, [33 USC 1365](#). If requesting expedited permit revocation procedures, a permittee shall certify that it is not subject to any pending enforcement actions including citizen suits brought under KRS Chapter 224.

Section 8. Federal Regulation Adopted Without Change. The following federal regulation governs the subject matter of this administrative regulation and is hereby adopted without change. [40 CFR Section 403.10\(e\)](#), "State Pretreatment Program in Lieu of POTW Program", revised as of July 1, 2001. The federal regulation is available for inspection and copying, subject to copyright laws, during normal business hours of 8 a.m. to 4:30 p.m., excluding state holidays, at the Division of Water, 14 Reilly Road, Frankfort, Kentucky. Copies are also available from the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402. (9 Ky.R. 872; Am. 1133; eff. 6-1-83; 11 Ky.R. 773; eff. 1-7-85; 12 Ky.R. 550; eff. 12-10-85; 20 Ky.R. 3282; 21 Ky.R. 430; eff. 8-24-94; 29 Ky.R. 1083; 1594; eff. 12-18-02; TAm eff. 8-9-2007.)